

Dock. 95-42

In the Matter of)
)
REQUEST OF A. C. NIELSEN COMPANY)
FOR PERMISSIVE AUTHORITY TO USE)
LINE 22 OF THE ACTIVE PORTION OF)
THE TELEVISION BROADCAST VIDEO)
SIGNAL FOR TRANSMITTING ENCODED)
ADVERTISING AND/OR PROGRAM)
IDENTIFICATION INFORMATION.)

File No. DA 89-1060

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Federal Communications Commission
Office of the Secretary

To: The Commission

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REPLY COMMENTS OF VIDCODE INCORPORATED IN
RESPONSE TO COMMISSION PUBLIC NOTICE

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SUMMARY

VidCode has previously demonstrated that Nielsen's request should be denied by the Commission both on the basis that their request is anticompetitive and would destroy innovation. Nielsen's comments provide no basis for any other conclusions. Nielsen admits that it is in competition with VidCode and Airtrax and it seeks the authority through this request to predate against these newly emerging innovative competitors. As a monopolist in the relevant markets and submarkets, Nielsen should not be given license to destroy new competition.

Indeed, VidCode seeks in this proceeding merely that which Nielsen itself sought in the TeleScan proceeding, namely that its prior use of the television scan lines not be interfered with through licensing of incompatible technology. Nielsen has refused to even attempt to develop compatible technology or to demonstrate that such technology cannot be developed.

VidCode does not seek to destroy Nielsen as a competitor in the relevant market sectors. To the contrary, Nielsen does not need to move to Line 22 to compete with VidCode. Nielsen is already a competitor through its Monitor Plus service and will continue to compete with VidCode even if its request to move to Line 22 is denied.

Nielsen has shown no cognizable public interest served by granting its request. On the other hand, Nielsen seeks authority to act contrary to the public interest by predateding upon its emerging innovative competitors. The Commission should not sanction such predation. Nielsen's request should be denied.

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REPLY COMMENTS OF VIDCODE INCORPORATED

I. INTRODUCTION

In accordance with the Commission's Public Notice of September 1, 1989, VidCode Incorporated ("VidCode") submits this memorandum in response to Comments filed by interested parties, in particular A.C. Nielsen Company ("Nielsen").

A. VidCode's Comments

1. In its earlier Comments in this proceeding filed September 22, 1989, VidCode demonstrated that:

- Nielsen is the predominant and financially powerful supplier of national television ratings services;
- VidCode is an emerging entrant in the related service of verifying the broadcasting of advertisements through innovative technology which is specially designed for use on Line 22 of the Active Video Signal;
- using AMOL technology, Nielsen also provides commercial verification services in competition with VidCode (and Airtrax);
- Nielsen has now requested authority to utilize its existing AMOL technology on Line 22 to expand its rating services in the syndicated programming market sector, and its intended use of Line 22 will interfere with and undercut the commercial viability of VidCode's Line 22 commercial verification services;
- Nielsen has failed to demonstrate its need to use Line 22 (as opposed to available alternatives which would not interfere with VidCode's operations); and
- if Nielsen's request were granted by the Commission, Nielsen would, in effect, be authorized by the FCC to use its technological capabilities to destroy its emerging competitors before they had the opportunity to establish a market position.

2. In light of the Commission's policy favoring promotion of competition and technological innovation and the failure of Nielsen to provide any countervailing public interest served by its use of Line 22 (as opposed to available alternatives), VidCode urged that Nielsen's request be denied.

B. Nielsen's Comments

3. On that same date, Nielsen filed its Comments. Nielsen's statements are noteworthy for several important assertions and/or omissions.

- First, Nielsen has expressly confirmed its involvement in verification services for network-broadcast commercials (in competition with VidCode and Airtrax). Id., at 8-9.
- Second, Nielsen has now notified the Commission that a major purpose underlying its request is the extension of this commercial verification service to include commercials shown in connection with syndicated programming (again, directly competing with VidCode and Airtrax). Id., at 8.
- Third, Nielsen does not even attempt to demonstrate that, under its original proposal, Nielsen could encode Line 22 using its AMOL technology without interfering with the use of Line 22 by VidCode and/or Airtrax as authorized by the Commission.
- Fourth, Nielsen asserts that it is inappropriate for the Commission to require compatibility of use, but rather that the Commission should allow the marketplace to decide whether differing transmission systems should be made compatible and the manner in which that compatibility should be achieved. Id., at i; 15-18.
- Fifth, while Nielsen alludes to "various technical ways in which to render transmission systems 'compatible'" which may be "worthy of the

significant technical investigation", id., at 15, Nielsen has failed to undertake this investigation and at most offers the possibility of a technical compromise which Nielsen attributes to the Commission staff. This proffered compromise fails to move this proceeding forward since Nielsen has failed to demonstrate (or even attempt to demonstrate) that this technology can work in a manner which provides reasonable assurance of protection of VidCode and Airtrax from interference by Nielsen.

II. DISCUSSION

4. Nielsen's Comments fail to provide any legally cognizable basis for concluding that the grant of their request would be in the public interest. Moreover, Nielsen has utterly failed to demonstrate that it could operate on Line 22 in a manner which would not interfere with VidCode's licensed operations.

A. Nielsen's Request Should Be Rejected As Anticompetitive

5. The essence of Nielsen's argument in favor of its request is the assertion that the Commission should rely exclusively on "the marketplace" to determine whether Nielsen should be allowed to offer a service which is inherently incompatible with VidCode's use of Line 22 as already licensed by the Commission. Id., at 15-18. This argument is wholly untenable, turning antitrust and regulatory practice and policy on its head. Rather than reflecting the proper application of deregulatory, pro-

competition policy, Nielsen's request is the very antithesis of this policy.

6. It is appropriate -- indeed essential -- for the Commission to promote competition among market participants in order to assure that marketplace demands are met. This, however, requires that market power be dispersed and not focussed in the hands of a monopolist. The grant of Nielsen's request would undermine these goals by placing such market power exclusively in the hands of Nielsen. Nielsen has requested the authority to use the technology associated with its monopoly service AMOL verification of program (ratings)¹ to interfere with the services provided by its emerging competitors in a second market sector (commercial verification).²

1. Although Nielsen and its parent company do not publish specific data on Nielsen's market share, we are told by reliable industry analysts that Nielsen is estimated to control 60-65 percent of all television monitoring services. (The Arbitron Company controls the remainder of the market.) Nielsen is the sole current provider of electronically-supported rating services, giving Nielsen 100 percent of this market segment. Moreover, in numerous major markets, Arbitron does not operate and only Nielsen is present, giving Nielsen at or near 100 percent of those markets. The extent of Nielsen's market control is attested to by the Public Broadcast System ("PBS"). In Comments filed in this Docket, PBS noted (at 2, n.1) that broadcasters must, as a practical matter, agree to use Nielsen ratings and AMOL (which Nielsen requires as an element of its ratings system). Thus, all available data indicates that Nielsen possesses monopoly power in the relevant markets.

2. Moreover, Nielsen would also destroy potential competitors for its monopoly service. Airtrax is already
(continued...)

7. This is directly inconsistent with current antitrust policy.³ As the Supreme Court has observed, it is a basic pillar of antitrust law and policy that vigorous competition will provide the greatest benefit to the public. See, e.g., Northern Pacific Railway v. United States, 356 U.S. 1, 4 (1958) (competition "will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress"). Moreover, the courts have recognized that an important goal of antitrust policy is to protect and promote innovation. E.g., Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 282-83 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980); In re IBM Peripheral EDP Devices, 481 F. Supp. 965, 1003 (N.D. Cal. 1979); aff'd, Transamerica Computer Co. v. International Business Machines Corp., 698 F.2d 1377 (9th Cir.), cert. denied, 464 U.S. 955 (1983). Yet, if Nielsen's request were granted, it would eliminate both potential competition with

2. (...continued)

authorized by the FCC to verify program broadcasting and is capable of doing so in ways superior to AMOL. VidCode's innovative technology can be employed for this purpose as well.

3. Reference to antitrust law and policy is an appropriate step for the Commission in applying the "public interest" standard of the Communications Act. See, e.g., Rogers Radio Communication Services, Inc. v. Federal Communications Commission, 593 F.2d 1225, 1230 (D.C. Cir. 1978) ("Effect on competition was clearly a proper factor for the Commission to consider under the public interest, convenience and necessity standard...").

Nielsen's AMOL service in program verification, and actual competition with innovative and potentially superior technologies in commercial verification, thus denying consumers the opportunity to select among competing providers of these services and permitting Nielsen to extend its ratings services monopoly to commercial verification.

8. Nielsen does not deny that such interference may result from its operation. To the contrary, Nielsen's Comments reflect a clear intention to utilize this interference to predate upon its competitors. Although the present issue of incompatibility could be avoided by a number of alternatives,⁴ Nielsen has simply announced its refusal to even contemplate these options.⁵

9. By contrast, VidCode has not asked the Commission to eliminate Nielsen as a competitor or to allow VidCode to interfere with Nielsen's operations. And Nielsen does not

4. For example, presently available equipment could be placed in local stations to prevent stripping Line 20 upon recording; Nielsen could develop and use technology applicable to Line 23 or any other line besides Line 22; or Nielsen could develop equipment which could be operated compatibly with VidCode and Airtrax signals.

5. Nielsen's preclusionary intent and the anticompetitive effect of its request are further underscored by Nielsen's intention to continue its exclusive operations on Line 20 as well. Nielsen thus seeks effectively exclusive use of two of the television scan lines. Another Line (21) is already dedicated to close captioning. In effect, Nielsen would have, by combination of FCC license and overwhelming market position, control of most (if not all) of the reasonably available lines.

need to move to Line 22 to compete with VidCode. Nielsen is already a competitor through its "Monitor Plus" service and will continue to compete with VidCode even if its request to move to Line 22 is denied. Moreover, VidCode has no objection to the grant of Nielsen's request once it is shown by Nielsen that alternatives to moving to Line 22 are unavailable and that Nielsen's AMOL can operate on Line 22 in a manner compatible with Line 22 uses already licensed by the Commission.⁶

6. For a number of reasons, Nielsen's half-heartedly proposed compromise (Nielsen Comments at 20), relating to use of a pausing device, fails to provide adequate assurance at this point. First, the concept has never been described in detail to the Commission and the record fails to disclose the capabilities of such technology, if it in fact exists. Second, apparently the device would be placed in Nielsen's control or in the control of persons subject to Nielsen's influence, whose incentives to monitor and ensure the proper operation of the device would be small indeed. Failure to vigorously monitor its operations could cause irreparable injury to VidCode (and Airtrax). Third, Nielsen has already refused to make the financial commitment to develop and/or utilize other technology which would eliminate the incompatibility problem presented by its request. There is no reason to believe, therefore, that this compromise is put forward in good faith. Fourth, none of this would be necessary if, instead of investing in pausing machines, Nielsen would invest the same amount in other in-station equipment, such as new recording devices which do not strip Line 20. Nielsen is in the position to obtain cooperation from broadcast licensees in placing these already-available and proven devices where needed.

In any event, the Commission should not settle on any particular compromise until a proceeding has been held to determine the capabilities of this option in comparison with other options, and in particular the extent to which these options eliminate interference between Nielsen's encoding and that of previously licensed users of Line 22.

B. Nielsen's Request is Inconsistent With The Commission's Mandate to Promote Innovation

10. Nielsen has also failed to demonstrate that its request is consistent with the Commission's statutory mandate, 47 U.S.C. § 157, to promote innovation in technology:

- (a) It shall be the policy of the United States to encourage the provision of new technologies and services to the public. Any person or party (other than the Commission) who opposes a new technology or service proposed to be permitted under this chapter shall have the burden to demonstrate that such proposal is inconsistent with the public interest.

11. VidCode offers new services to the broadcast advertising public using innovative technology. These services are demonstrably superior to commercial verification services provided through AMOL-based verification systems.⁷ Nielsen's request will not promote

7. Nielsen's AMOL system encodes the source of the television signal and the time and date of the recording or broadcast or, in the case of syndicated shows, the time and date of the satellite transmission or duplication of the master tape of the show. Identifying commercials imbedded in a syndicated show would require Nielsen separately to obtain information from the syndicator or tape duplication facility and the advertiser or agency concerning the profile of the commercial and the exact time slot within the show that the commercial was inserted. This data would then have to be correlated with the AMOL data monitored by Nielsen.

Since the collection of the profile data for the commercial is in the hands of the syndicator or duplication facility, Nielsen cannot assure its accuracy. Once a commercial is imbedded in a syndicated show the slate is no longer associated with the commercial so that the duplication facility or syndicator must obtain the

(continued...)

the development or use of any new technologies. Indeed, Nielsen refuses to make any effort to alter or adapt their old, inflexible and unreliable verification technology for any purpose or to operate in any new manner. Nielsen comes before this Commission utterly refusing to innovate and demanding the authority to destroy innovative competitors.

12. Nielsen bears the burden of demonstrating that the public interest is served by authorizing Nielsen to predate against VidCode (and Airtrax). This they have failed to even attempt to do and, therefore, consistent with the Commission's statutory mandate (§ 157), Nielsen's request must be denied.

C. Denial of Nielsen's Request Is Consistent With Nielsen's Positions In the TeleScan Proceeding

13. In opposing Nielsen's request, VidCode has asked of the Commission for essentially what Nielsen demanded in

7. (...continued)
information from another source. In addition, the AMOL system is not capable of verifying the transmission of commercials inserted by a local station.

The VidCode system is inherently much more reliable and flexible. The encoding of the commercial and the capture of the profile data normally takes place under the control of VidCode before the initial duplication of the master tape, and is obtained directly from the slate of the original master tape of the commercial. The encoded signal uniquely identifies the commercial and, and so long as it is not erased by later processing of the signal or tapes, is easily and reliably correlated with the profile data collected by VidCode.

its Comments filed in the original TeleScan proceeding. In those Comments, filed July 5, 1985 and attached hereto (Attachment A), Nielsen recognized that VidCode's predecessor had borne its burden of showing that the VidCode technology could operate without causing "unacceptable interference to Nielsen's use of Line 20 of that signal." Nielsen went on to

request that the Commission recognize the untested nature of the transmission services proposed by TeleScan and AdAudit, and state explicitly that they will be responsible to remedy and correct any interference caused to previously-authorized users of the television signal, including the vertical blanking interval, and must cease operation pending the resolution of such occurrences. (emphasis added).

14. The consideration that VidCode requests now, and what Nielsen itself requested just four years ago, reflects broad, long-standing Commission policy: grants of Commission authority are frequently conditioned on the grantee's ability to ensure that a previously authorized user will not be interfered with. See, e.g., Broadcast Corp. of Georgia, 55 R.R.2d 854 (1984); Sunrise Communications, Inc., 41 R.R.2d 1008 (1977). Thus, as the Commission has held in other contexts, and as Nielsen has urged upon the Commission in a similar context, Nielsen should not be allowed to operate on Line 22 until it can show that its use of Line 22 will not interfere with VidCode's use.

15. There are only two distinctions between the 1985 TeleScan request and the current request of Nielsen, both of which reinforce the reasons for denying this request. First, Nielsen has failed here even to attempt to demonstrate that its use of Line 22 will not interfere with the previously-authorized use of Line 22 by VidCode (and Airtrax).⁸ The only conclusion reasonably supported by this record is that -- in Nielsen's own words -- Nielsen will interfere with "previously-authorized users of the television signal, including the vertical blanking interval, and must cease operation [on Line 22] pending the resolution" of this interference. Second, here the interference can and will be used by a monopolist to predate on its emerging competitors.

16. A fortiori, the logic of Nielsen's own filing in TeleScan requires that Nielsen not be allowed to operate on

8. As Nielsen admitted, TeleScan and AdAudit had demonstrated that they could operate on Line 22 without interfering with Nielsen's Line 20 AMOL encoding. Thus, Nielsen's request in 1985 was purely hypothetical and did not have to be addressed by the Commission in the TeleScan authorization letters. Moreover, the Commission has never since been required to deal with this concern since to the best of our knowledge, no Line 22 service has ever interfered with Nielsen's Line 20 AMOL encoding. There is no indication, however, that the Commission rejected the logic of Nielsen's demand for compatibility with previously authorized users had the possibility of interference been shown.

Line 22 until it demonstrates the ability not to interfere with VidCode (and Airtrax).

D. Operation of Nielsen's AMOL on Line 22 is Not Consistent with the TeleScan Decisions

17. Nielsen has repeatedly claimed that the grant of its request to move AMOL to Line 22 is a simple application of the Commission's decisions in TeleScan and particularly the request of VidCode to use the TeleScan authority. This claim misses the mark for two reasons.

18. First, as reflected in the VidCode authorization letter (Attachment B), the Commission has authorized use of Line 22 by any

system having the same technical characteristics as the TeleScan system so long as the conditions set forth in that letter are satisfied.

19. AMOL does not have the same technical characteristics as the TeleScan system. The technical characteristics of TeleScan and all other currently authorized users of Line 22 allow for compatible usage and do not provide for overencoding and interference. Due to its technical characteristics, AMOL does not allow for such compatibility.

20. Second, Nielsen incorrectly characterizes the technical characteristics of TeleScan and VidCode as involving Source Identification ("SID") coding. Neither VidCode nor Airtrax use SID coding, in which the source of

the program (e.g., network, independent syndicate or tape duplication facility) is identified. This is done only in the AMOL system, which ignores content-related characteristics of a commercial. VidCode, on the other hand, identifies the commercial itself, and ignores whether the source is a network, a syndicator or something else.

21. Thus, Nielsen's claim that encoding AMOL on Line 22 is already authorized by the TeleScan decision is based on mischaracterization of the TeleScan/VidCode system and its technical characteristics.

E. The "Efficient Operation of the Market" Will Not Be Served by Granting Nielsen's Request

22. Lastly, Nielsen asserts, Comments at 16, that unless it is allowed to interfere with and destroy VidCode (and Airtrax), "the efficient operation of the market" would be subverted. This extraordinary assertion is simply unsupportable.

23. Nielsen attempts to support this claim by asserting that its customers are clamoring to use AMOL exclusively for program and commercial verification. Id. The statements of record, however, include a large number of Nielsen customers and potential customers which support co-existence of AMOL-type services on the one hand and commercial verification services (like VidCode and Airtrax) on the other. See, e.g., Comments of Donovan Data Systems,

Inc.; AIM, Inc.; Ogilvy & Mather; Barris Program Sales. Those statements of record which support Nielsen generally do so in the stated (false) presumption that Nielsen can demonstrate compatibilities. See, e.g., Comments of Proctor and Gamble Co. ("We understand that Line 22 can be technically used by one service without foreclosing it to another service."); Paramount Pictures Corp. ("Airtrax incorrectly suggests that Nielsen's use of Line 22 will preclude their own use of that line.") Neither of these interveners nor any others have provided any information suggesting that the presumed compatibility could in fact be achieved.

24. Moreover, Nielsen cannot legitimately serve all market segments for commercial and program verification. Its principal customers currently include the networks, affiliates and independent stations whose interests would be adversely effected by Nielsen reporting to advertisers that commercials were broadcast improperly or not at all. To avoid such conflicts of interests, advertisers require verification independent of the interests of these broadcasters. Without an alternative commercial verification service to Nielsen, and conflicts of interest are certain to arise. To provide efficient and effective service in the emerging markets for commercial and program verification, Nielsen cannot be allowed to interfere with

and destroy VidCode, Airtrax and other potential users of Line 22 for commercial and program electronic verification.

CONCLUSION

25. For all these reasons, and in particular in light of the anti-competitive effects which would arise from the grant of Nielsen's request, that request should be denied. A fortiori, the request for Special Temporary Authority should be denied as well.

Respectfully submitted,

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JUL 5 1985

FCC
Office of the Secretary

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

In re: Requests of)
)
TELESCAN, INC. and) MMP - 1
AD AUDIT, INC.) MMP - 2
)
For Authority to Utilize Line 22)
of the Television Video Signal)
to Encode Advertisement and Program)
Identification Information.)

COMMENTS OF
A. C. NIELSEN, INC.

A. C. Nielsen, Inc., by its attorneys ("Nielsen"), herein comments upon the requests of TeleScan, Inc., and Ad Audit, Inc., for authority to utilize Line 22 of the television video signal to transmit encoded information used to identify and verify the broadcast of advertisements and programs. These Requests were filed on May 7, 1985 and June 12, 1985, respectively.

1. Nielsen is a worldwide business consulting firm, with a significant involvement in marketing and media research. As indicated in Attachment II of TeleScan's Request, Nielsen utilizes Line 20 of the vertical blanking interval in every recognized television market in the country in its marketing and media research efforts. Consequently, Nielsen clearly is an interested

party with standing to comment upon the TeleScan and Ad Audit proposals.

2. The limited information provided in the TeleScan and Ad Audit Requests regarding the technical parameters of their proposed transmission systems does not allow a verification of their explicit or implicit claims that their systems "will cause no significant degradation to any portion of the visual or aural signal [of an authorized television station], nor produce emissions outside the authorized television channel." Statement of Howard T. Head, attached to the Request of Ad Audit. Nevertheless, it does not appear that the operation of these proposed transmission systems will cause unacceptable interference to Nielsen's use of Line 20 of that signal. For this reason, Nielsen does not oppose the granting of the TeleScan or Ad Audit Requests.

3. Nevertheless, Nielsen does request that the Commission recognize the untested nature of the transmission services proposed by TeleScan and Ad Audit, and state explicitly in any authorization granted to these parties that they will be responsible to remedy and correct any interference caused to previously-authorized users of the television signal, including the vertical blanking

interval, and must cease operation pending the resolution
of such occurrences.

Respectfully submitted,

A. C. NIELSEN, INC.

By: 
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Dated: July 5, 1985

Blumenthal

OCT 26 1988

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MAIL BRANCH

OCT 26 1988

Mr. Kevin McMahon
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OCT 27 1988

MAIL BRANCH

signed by
mailed by

Dear Mr. McMahon:

This is in response to your letters of August 23, and September 14, 1988, regarding the general use of the "TeleScan system" to encode advertiser identification signals on line 22 of the television active video signal by television station licensees. Specifically, you request that the Commission confirm that the authorization it granted for use of the "TeleScan system" by TeleScan, Inc., (letter dated July 18, 1985) applies to the provision of such services by VidCode, Inc., as well. You note that VidCode is a new company that is unrelated to TeleScan and will have different ownership. You also state that VidCode expects to acquire the patents and patent applications for the "TeleScan system" from their current owners.

As you know, on May 7, 1985, TeleScan requested that the Commission approve a system to encode advertiser identification signals on line 22 of the television active video signal. The Commission approved TeleScan's request, determining, first, that the transmission of such data qualified as a "special signal," (i.e., a signal that is related to broadcast operation, but not intended for public use), and, second, that the authority granted was "for general use of the TeleScan system on line 22 by licensees in the television services." The authority granted in the July 18, 1985, letter allows television licensee to employ a system having the same technical characteristics as the TeleScan system so long as the conditions set forth in that letter are satisfied. The Federal Communications Commission expresses no position with respect to the legality under applicable laws relating to intellectual property rights of the use of the TeleScan system by VidCode or any other party. Moreover, we wish to emphasize that this is a permissive authority only. Television licensees retain ultimate control over their transmissions and are not required to transmit VidCode signals.

Sincerely,

Alex D. Felker
Chief, Mass Media Bureau

PBlumenthal:jy:pab:lrd:MB
Typed: 10/24/88